# Soo Lina v Ngu Chu Chiong (Chong Oi Khium Irene, co-respondent)

HIGH COURT (KUCHING) — DIVORCE PETITION NO KG 9 OF 1991
HAIDAR J
19 MAY 1992

***Family Law*** *— Consent order — Setting aside — Consent order for maintenance, property division, custody and lump sum maintenance in previous divorce proceeding — Application for ancillary relief in subsequent divorce proceedings — Variation of order only in respect of maintenance — Law Reform (Marriage and Divorce) Act 1976 ss 83, 84, 96 & 97 — Divorce and Matrimonial Proceedings Rules 1980 r 2(1)*

***Family Law*** *— Procedure — Appeal from decision of registrar to judge-in-chambers in matrimonial proceedings — Whether properly brought — Whether Rules of the High Court 1980 applicable to such proceedings — Divorce and Matrimonial Rules 1980 r 3 — Rules of the High Court 1980 O 56 r 1*

***Family Law*** *— Procedure — Ancillary relief — Application made in wrong form — Whether an irregularity capable of being cured — Divorce and Matrimonial Proceedings Rules 1980 rr 3, 4, 56 & 61 — Interpretation Acts 1948 & 1967 s 62*

The petitioner presented a divorce petition in which she also filed a notice of application for ancillary relief in Form 11 of the Divorce and Matrimonial Proceedings Rules 1980. The respondent objected to the application on the primary ground that there was in existence a consent order for maintenance, property division, and custody of the child of the marriage made in earlier proceedings in which a decree of judicial separation was granted. The respondent's counsel also contended that the notice of application for ancillary relief should have been made in Form 13 of the Rules. The deputy registrar of the court overruled the objection. The respondent appealed to the judge-in-chambers under O 56 r 1 of the Rules of the High Court 1980.

At the hearing of the appeal, counsel for the petitioner contended that the appeal was not properly brought on the ground that the Rules of the High Court 1980 did not apply to the proceedings.

**Held**, allowing the appeal:

(1) By r 3 of the Divorce and Matrimonial Proceedings Rules 1980, the respondent could properly invoke O 56 r 1 of the Rules of the High Court 1980 and therefore the appeal had been properly filed.

(2) Where a petitioner has also applied for ancillary relief in the petition and intends to proceed with the petition, the petitioner shall file the notice of application in Form 13. The use of Form 11 by the petitioner would appear to be only an irregularity which was curable by O 2 of the Rules of the High Court 1980 and in view of the provisions of s 62 of the Interpretations Acts 1948 and 1967. The two forms are in substance almost identical. The use

of the wrong form in this case had no substantial effect and was not calculated to mislead.

(3) A consent order is a final order. However, it can only be set aside if it is shown that the consent order was obtained through misrepresentation or mistake of fact. Section 83 of the Law Reform (Marriage and Divorce) Act 1976 ('the Act') empowers the court at any time and from time to time to vary or rescind any subsisting order for maintenance where it is satisfied that the order was based on any misrepresentation of fact or where there has been any material change in the circumstances. Going by the meaning of the term 'variation order' in the Divorce and Matrimonial Proceedings Rules 1980, the petitioner in this case could apply by way of notice of application for ancillary relief to vary only the order in respect of maintenance made in the earlier divorce proceedings.

(4) When a property adjustment order is made, be it in a judicial separation or divorce proceedings, s 76(1) of the Act is intended to make such an order final. The Act would appear to confine the power of the court to vary an order in respect of maintenance for the petitioner or the child.

(5) Alternatively, in the present proceedings, by the terms of the consent order, it would seem that the petitioner was entitled to seek a variation order for maintenance. By implication, the parties intended that in respect of property division, the consent order was to be a final order.

(6) The divorce legislation provides that a notice of application for another ancillary relief in subsequent divorce proceedings is to be confined to a variation order. It was for the petitioner to show that there had been a misrepresentation or mistake of fact or that there had been any material change in the circumstances of the case. There was no such allegation in the present case.

**[Bahasa Malaysia summary**

Pempetisyen telah mengemukakan petisyen perceraian di mana beliau juga memfailkan notis memohon relief sampingan di dalam Borang 11 Kaedah-Kaedah Prosiding Perceraian dan Perkahwinan 1980 ('Kaedah itu') Penentang membantah permohonan itu atas alasan utama bahawa terdapat suatu perintah persetujuan untuk nafkah, pembahagian harta, dan jagaan anak perkahwinan, yang dibuat dalam prosiding yang lebih awal di mana dekri pemisahan kehakiman telah diberi. Peguamcara penentang juga telah menegaskan bahawa notis memohon relief sampingan itu sepatutnya dibuat dalam Borang 13 Kaedah itu. Penolong pendaftar mahkamah telah menolak bantahan itu. Penentang telah merayu kepada hakim dalam kamar di bawah A 56 k 1 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT').

Di dalam pembicaraan rayuan itu, peguamcara pempetisyen telah berhujah bahawa rayuan itu tidak dibawa dengan cara yang betul atas alasan yang KMT tidak terpakai dalam prosiding ini.

**Diputuskan**, membenarkan rayuan itu:

(1) Menurut k 3 Kaedah itu, penentang boleh menggunakan A56 k 1 KMT dengan betul dan dengan itu rayuan itu telah difailkan dengan betul.

(2) Di mana suatu pempetisyen telah juga memohon relief sampingan di dalam petisyen itu dan bertujuan untuk meneruskan petisyen itu, pempetisyen hendaklah memfailkan notis memohon dalam Borang 13. Penggunaan Borang 11 oleh pempetisyen merupakan hanya suatu luar aturan yang boleh diatasi oleh A 2 KMT dan berdasarkan peruntukan s 62 Akta Tafsiran 1948 dan 1967. Kedua-dua borang itu adalah pada amnya sama. Penggunaan borang yang salah di dalam kes ini tidak membawa kesan yang substansial dan tidak bertujuan untuk mengelabui.

(3) Perintah persetujuan adalah perintah muktamad. Walau bagaimanapun, ianya hanya boleh diketepikan jika ditunjukkan bahawa perintah persetujuan itu didapati melalui salah nyataan atau silap fakta. Seksyen 83 Akta Membaharui Undang-Undang (Perkahwinan dan Perceraian) 1976 ('Akta itu') memberi kuasa kepada mahkamah pada bila-bila masa dan dari masa ke semasa untuk mengubah atau membatalkan sebarang perintah untuk nafkah yang wujud di mana ia berpuas hati yang perintah itu berdasarkan sebarang salah nyataan fakta atau di mana terdapat penukaran yang penting dalam keadaan. Mengikut makna terma 'perintah pengubahan' di dalam Kaedah itu, pempetisyen di dalam kes ini boleh memohon melalui notis memohon relief sampingan untuk mengubah hanya perintah berkenaan dengan nafkah yang telah dibuat di prosiding perceraian yang lebih awal.

(4) Apabila perintah pelarasan harta dibuat, sama ada di dalam suatu pemisahan kehakiman atau prosiding perceraian, s 76(1) Akta itu bertujuan membuat perintah seperti itu muktamad. Akta itu nampaknya membatasi kuasa mahkamah untuk mengubah sesuatu perintah mengenai nafkah untuk pempetisyen atau anaknya.

(5) Secara alternatif, di dalam prosiding sekarang ini, mengikut terma perintah persetujuan itu, nampaknya pempetisyen berhak meminta perintah pengubahan untuk nafkah. Secara tidak langsung, pihak-pihak bermaksud bahawa berkaitan dengan pembahagian harta, perintah persetujuan itu adalah perintah muktamad.

(6) Perundangan perceraian memperuntukkan bahawa suatu notis memohon relief sampingan yang lain di dalam prosiding perceraian yang berikut hendaklah dihadkan kepada suatu perintah pengubahan. Adalah bagi pempetisyen untuk menunjukkan bahawa terdapat salah nyataan atau silap fakta atau bahawa terdapat perubahan yang penting dalam keadaan kes ini. Tidak terdapat tuduhan sedemikian di dalam kes ini.]

**Cases referred to**

1 *Robinson v Robinson* [1982] 2 All ER 699; (1982) 126 SJ 360 (refd)

2 *Carson v Carson* [1983] 1 All ER 478; [1983] 1 WLR 285 (refd)

**Legislation referred to**

Interpretation Acts 1948 and 1967 ss 62, 76
Law Reform (Marriage and Divorce) Act 1976 ss 65(1), 76(1), 83, 84, 96, 97
Divorce and Matrimonial Proceedings Rules 1980 rr 2, 3, 46, 61
Rules of the High Court 1980 O 2, O 56 rr 1, 3

*Ernest Chua* (*Ernest Chua & Co*) for the appellant.
*KH Lin* (*Chong Bros*) for the respondent.

*Cur Adv Vult*

**Haidar J**: On 25 January 1991 the petitioner filed the present divorce petition against the respondent. At the same time, the petitioner also filed a notice of application for ancillary relief. On 18 March 1991, the respondent filed an affidavit in answer to notice of application for ancillary relief. The notice of application for ancillary relief was heard by the deputy registrar on 30 April 1991. The respondent objected to the notice of application for ancillary relief on the primary ground that there was a consent order for maintenance, property division, custody of the child and the lump sum maintenance given in a previous divorce petition no KG 61 of 1987 instituted by the petitioner against the respondent whereby judicial separation was granted. The respondent's counsel submitted that the consent order is binding on all the parties unless and until it has been set aside and it can act as an estoppel. She also raised the question of jurisdiction of the deputy registrar to hear the present notice of application for ancillary relief in view of the consent order made in divorce petition no KG 61 of 1987. The respondent's counsel also raised a procedural issue, that is, whether the notice of application for ancillary relief should be in Form 11 or Form 13. She submitted that it should be in Form 13 and not Form 11 as filed by the petitioner. The deputy registrar reserved his ruling. On 12 July 1991 the deputy registrar gave his written ruling. He was of the opinion that the objection could not stand and ordered the proceeding under r 61(1) of the Divorce and Matrimonial Proceedings Rules 1980 ('the Rules') to proceed. The respondent appealed to me against the said ruling under O 56 r 1 of the Rules of the High Court 1980 ('RHC').

At the hearing of the appeal before me, in addition to the grounds raised before the deputy registrar, there was this issue of whether the appeal was properly filed by the respondent. In other words are RHC applicable in matrimonial proceedings? No doubt, the Rules provide the procedure in matrimonial proceedings but r 3 of the Rules provides the application of other rules.

Rule 3(1) and (2) reads:

> (1) Subject to these Rules and to any other written law, the Subordinate Court Rules 1980 and the Rules of the High Court 1980 shall apply with necessary modifications to the commencement of matrimonial proceedings in, and to the practice and procedure in matrimonial proceedings pending in the Sessions Court and in the High Court respectively.

(2) For the purposes of para (1), any provision of these Rules authorising or requiring anything to be done in matrimonial proceedings shall be treated as if it were, in the case or proceedings pending in the High Court, a provision of the Rules of the High Court 1980.

It would appear that there is no provision in the Rules or Law Reform (Marriage and Divorce) Act 1976 ('the Act') on appeal against the order of the registrar. However, it would seem clear to me that by r 3 of the Rules, the respondent can properly invoke O 56 r 1 of RHC and in my opinion therefore, the appeal has been properly filed. I should therefore consider the merits of the appeal (see Vol 1 *Rayden and Jackson on Divorce* (15th Ed) p 772).

Before proceeding to consider the substantive ground, that is, whether the petitioner is entitled in law to proceed with her notice of application for ancillary relief dated 25 January 1991 filed in the present divorce proceedings and so ordered by the deputy registrar, notwithstanding, the existing order made by the High Court, Kuching on 14 June 1991 in divorce petition no KG 61 of 1987 between the parties, it is appropriate perhaps for me to consider and dispose of the issue of the proper form that should be used by the petitioner first.

I do not think that it is disputed that the petitioner has applied for ancillary relief in her petition. In that event if she intends to proceed with her application, r 61(1) of the Rules requires her to file a notice in Form 12. However an examination of r 61(1) and (2) of the Rules and Form 12 would seem to show that Form 12 therein should in fact be Form 13. Form 12 relates to r 46(1) and (2) of the Rules and r 61(2) relates to Form 11 or 13 in respect of an application for ancillary relief. I am therefore of the opinion that in a situation where a petitioner has also applied for ancillary relief in her petition and who intends to proceed with the application, shall file a notice in Form 13. In the present proceedings, it is not disputed that the petitioner used Form 11 in her notice of application for ancillary relief. Form 11 is intended to be covered in respect of an application for ancillary relief which should have been made in the petition or answer may be made subsequently by leave of the court (see r 56(2) of the Rules). In such a situation, is the notice of application for ancillary relief filed by the petitioner fatal? Looking at the two forms they are in substance almost identical. I am of the view that the use of Form 11 by the petitioner would appear to be only an irregularity which is curable by O 2 of RHC. In any event, s 62 of the Interpretation Acts 1948 and 1967 (Consolidated and Revised — 1989) provides:

> Any written law prescribing a form shall be deemed to provide that an instrument or other document purporting to be in that form shall not be invalidated by reason of any deviation from the form if the deviation has no substantial effect and is not calculated to mislead.

The respondent has filed an affidavit in answer to the notice of application for ancillary relief by the petitioner (see encl 13). In the circumstances, I am of the opinion that the use of Form 11 instead of Form 13 by the petitioner in this petition has no substantial effect and is not calculated to mislead. I therefore rule that the use of Form 11 is not fatal.

In considering the substantive issue of whether the petitioner can in law proceed with the present notice of application for ancillary relief, it is, I think relevant to consider the order made in the divorce petition no KG 61 of 1987.

Divorce petition No KG 61 of 1987 relates only to judicial separation. When granting a decree of judicial separation, according to s 76(1) of the Act, the court shall have the power to order the division between the parties of any assets acquired by them during the marriage by their joint efforts or the sale of any such assets and the division between the parties of the proceeds of sale. Section 76 further provides the considerations for the court to take in the exercise of its power to make the order. The court in divorce petition no KG 61 of 1987 ordered a decree of judicial separation to the petitioner and also granted to the petitioner the care and custody of the child of the marriage, namely, Emily Jasmine Ngu Beixe with reasonable access to the respondent. In addition thereto, there was a consent order made in respect of financial provisions and division of assets for the petitioner and the said child. It is relevant to reproduce this consent order dated 14 June 1989, which reads:

(1) That the interim order of maintenance for the petitioner dated 2 July 1988 be and is hereby varied and confirmed at $1,500 a month until further order or until the petitioner remarries.

(2) That the arrears of maintenance amounting to $9,200 be paid by the respondent to the petitioner within one week from the date of this order.

(3) That a new motor car, namely, a Proton Saga 1.5s be purchased by the respondent and registered in the name of the petitioner and delivered to her within one month from the date of this order.

(4) That a semi-detached house situated on that parcel of land and described as Lot 6236 section 64 Kuching Town Land District be transferred to the petitioner absolutely within one month from the date of this order.

(5) That a sum of $100,000 be set aside by the respondent for the educational expenses of the child of the marriage, namely, Emily Jasmine Ngui Beixe as and when she is accepted by a respectable university or college, the said sum to be paid as follows:

(i) A sum of $30,000 by way of a Fixed Deposit Account to be opened at a bank or financial institution in the name of the petitioner as trustee for the child of the marriage within two weeks from the date of this order.

(ii) A sum of $70,000 to be secured by a charge over the respondent's 1/4 share in all that parcel of land described as Lot 3, Block 16 Kuching Central Land District.

Or in the alternative, in the event that the child of the marriage is accepted by a respectable university or college on a scholarship, the said sum of $100,000 is to be paid to the said child of the marriage when she reaches 21 years of age.

(6) That in the event that the petitioner leaves Malaysia for a period of over one month the temporary care and custody of the child of the marriage shall be with the respondent.

(7) That the respondent shall pay to the petitioner an agreed costs of $4000 within one week from the date of this order.

It is to be noted that in divorce petition no KG 61 of 1987, the registrar did an investigation under r 65 of the Rules and submitted it to the court.

However, the parties by consent and taking into account of the registrar's report, agreed on 2 July 1988 to a maintenance of $1,250 per month pending suit, for the petitioner commencing from 7 July 1988 and thereafter on the seventh day of each subsequent month until further order. In the subsequent consent order dated 14 June 1989, the interim order of maintenance for the petitioner was varied and confirmed at $1,500 a month until further order or until the petitioner remarries. It is however, interesting to observe that the notice of application for maintenance was in respect of both the petitioner and the child of the marriage and the registrar's report would appear to take into consideration of the maintenance for the child of the marriage as well. In the consent order, the maintenance was only in respect of the petitioner.

It is not disputed that the petitioner, by virtue of s 65(1) of the Act, shall not be prevented from presenting a petition for divorce, or for that matter the court from pronouncing a decree of divorce, by reason only that the petitioner has at any time been granted a judicial separation upon the same or substantially the same facts as those proved in support of the petition for divorce. What is disputed here by the respondent is whether the petitioner can, in filing a subsequent petition for divorce, apply for ancillary relief of maintenance for a higher sum and division of properties in the face of a consent order given in the judicial separation and complied therewith by the respondent, when there has been no application to set aside the consent order or for that matter to vary the consent order. A consent order is a final order. However it can only be set aside if it is shown that the consent order was obtained through misrepresentation or mistake of fact. Section 83 of the Act empowers the court at any time and from time to time to vary, or rescind any subsisting order for maintenance where it is satisfied that the order was based on any misrepresentation or mistake of fact or where there has been any material change in the circumstances (see *Robinson v Robinson*[1])

'Ancillary relief' under r 2(1) of the Rules, means:

(a) an avoidance of disposition order;
(b) a financial provision order;
(c) an order for maintenance pending suit;
(d) a property adjustment order; or
(e) a variation order.

'Variation order' in the Rules means an order under ss 83, 84, 96 and 97 of the Act. Going by the meaning of 'variation order' the petitioner in this case can apply by way of notice of application for ancillary relief to vary only the order in respect of maintenance made in divorce petition no KG 61 of 1987. In the case of *Carson* v *Carson*[2] Ormrod LJ, in considering an application for a second property adjustment order by the wife, said at p 481:

> This is a case where an attempt was being made to obtain a second property adjustment order in relation to the same capital asset and it is not necessary in this judgment to consider what the position might have been if some other capital asset was involved. In my judgment the judge in the court below was completely right in rejecting that application by the wife. If he had entertained it,

A he would clearly have been running counter to the provisions of s 31 of the 1973 Act, which make it clear that the court has no power to vary a property adjustment order in any circumstances.

There is no similar express provisions in our divorce legislation as s 31 of the English Act which ousts the power of the court to vary a property B adjustment order. At the same time, there is no statutory provision in respect of variation for a property adjustment order in our divorce legislation. In the circumstances, I am of the opinion that when a property adjustment order is made, be it in a judicial separation or divorce proceedings, s 76(1) of the Act is intended to make such an order final. The Act would appear to confine the power of the court to vary an order in respect C of maintenance for the petitioner or the child (see ss 83, 84, 96 and 97 of the Act). Alternatively, in the present proceedings, because of the words 'until further order' in the consent order obtained in divorce proceedings no KG 61 of 1987 it would seem that the petitioner is entitled to seek a variation order for maintenance. By implication, the parties intended that D in respect of property division, it is to be a final order.

In the present notice of application for ancillary relief it would appear that the petitioner is starting afresh as the petitioner is not praying for a variation or rescission of the consent order as envisaged in ss 83 and 96 of the Act. I do not, with respect, agree with the contention of Mr Ernest Chua, counsel for the petitioner, that she has a right to pray for a separate E ancillary relief in a judicial separation as well as in a subsequent divorce proceedings on the ground that there is no bar to file divorce proceedings after a judicial separation order has been granted. Even though there is no bar for the petitioner to file divorce proceedings after a judicial separation order has been granted, it does not, in my view, mean that the petitioner is F entitled to seek for another ancillary relief except as provided by the Rules and the Act. In the filing of a notice of application for another ancillary relief in a subsequent divorce proceedings, our divorce legislation provides that it [the notice] is only to be confined to a variation order as the definition of ancillary relief seems to indicate. It is then for the petitioner to show that there has been a misrepresentation or mistake of fact or there has G been any material change in the circumstances of the case. There is no such allegation in the subsequent notice of application for ancillary relief in the present divorce proceedings.

In the circumstances, I am of the opinion that the notice of application for ancillary relief in this petition has not been properly filed and therefore H the registrar's ruling that he can proceed with the notice of application for ancillary relief by the petitioner was clearly wrong. I would allow the appeal with costs and order that the notice of application for ancillary relief be struck out.

*Appeal allowed.*

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Reported by PS Ranjan